

# Legal Duties in Representing Juveniles Facing LWOP & Considerations for Other Young Offenders

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# Overview

- Supreme Refresher
- Representing Juveniles Facing LWOP
- New Developments in the Science of Juvenile Brain Development
- Representing Other Young Offenders
  - Legal Arguments to Expand *Miller*
  - Educating Decision-Makers

# Supreme Court Refresher – Juvenile Sentencing Cases

# Juvenile Sentencing Cases

*Roper v. Simmons*, 543 U.S. 551 (2005)

- *Holding*: the death penalty is categorically disproportionate for offenders under the age of 18.

*Graham v. Florida*, 560 U.S. 48 (2010)

- *Holding*: LWOP unconstitutional for juvenile (under the age of 18) non-homicide offenders.

*Miller v. Alabama*, 567 U.S. 460 (2012)

- *Holding*: Mandatory LWOP sentences are unconstitutional for juveniles (under the age of 18)

*Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

- *Holding*: To comply with *Miller*, South Carolina juveniles facing LWOP must have an individualized sentencing hearing and juveniles previously sentenced to LWOP must be resentenced in an individualized sentencing hearing

*Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)

- *Holding*: *Miller* was a substantive decision and is retroactive

# “Rules” from *Miller*, *Aiken* and *Montgomery*

LWOP is *presumptively* inappropriate for a juvenile offender:

- *Miller* – “[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”
- *Montgomery* – a juvenile can only be sentenced to LWOP if the crime reflects “irreparable corruption.” On the other hand, if it reflects “transient immaturity” then a LWOP sentence violates the 8<sup>th</sup> Amendment.
- *Aiken* – “children are different and those differences counsel against irrevocably sentencing them to a lifetime in prison”.

**“[Y]outh has constitutional significance.” – *Aiken***

- “[T]he failure of a sentencing court to *consider* the *hallmark features* of youth prior to sentencing offends the Constitution.”
- “*Miller* ... establishes an *affirmative requirement* that courts *fully explore* the impact of the defendant’s juvenility on the sentence rendered.”
- A sentencing hearing that “touch[es] on the issues of youth” is insufficient; “factors of youth” must be “carefully and thoughtfully considered.”

# Required Considerations under *Aiken*

“*Miller* establishes a specific framework, articulating that the factors a sentencing court [must] consider at a hearing must include:”

1. “the chronological age of the offender and the hallmark features of youth, including ‘immaturity, impetuosity, and failure to appreciate the risks and consequence’;”
2. “the ‘family and home environment’ that surrounded the offender;”
3. “the circumstances of the homicide offense, including the extent of the offender’s participation in the conduct and how familial and peer pressures may have affected him;”
4. “the ‘incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender’s] incapacity to assist his own attorneys’; and”
5. “the ‘possibility of rehabilitation.’”

# The Capital Trial “Comparison”

- The *Aiken* Court stopped short of adopting specific procedures for cases where a juvenile faces a potential sentence of life without parole (“We decline ... to set out a specific process for trial court judges to follow when considering whether to sentence a juvenile to [LWOP]”), but the majority drew a clear analogy to capital cases:
  - “While we do not go so far as some commentators who suggest that the sentencing of a juvenile offender subject to a life without parole sentence should mirror the penalty phase of a capital trial, we are mindful that the *Miller* Court specifically linked the individualized requirements of capital sentencing to juvenile life without parole sentences. Thus the type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above.” *Aiken*, 410 S.C. at 544.

# Representing Juveniles Facing LWOP



# Preparation for a Sentencing Hearing: *Investigation*

## *Areas to Investigate*

- Circumstances of the Offense
- Prior Adjudications/Convictions
- Social, Medical, Educational, and Employment History
- Cognitive Impairments and Brain Development
- Institutional History

## *Other Considerations*

- Creating Mitigation
- Release plan?

# Preparation for a Sentencing Hearing: *Working with Experts*

Mitigation  
Investigator

Mental Health  
Experts

Social  
Historian

Other  
Experts?

Preparation for a  
Sentencing  
Hearing:  
*Identifying  
Similar Cases  
that did not result  
in LWOP*

Look at other similar cases in the county/circuit/state to find similar offenses that resulted in sentences less than life without parole.

- More than 80% of the class members are persons of color, and our initial research has revealed that African-American juveniles are sentenced more harshly than white defendants, especially when the victims are white.
- Identifying similar cases that resulted in lower sentences can assist in “anchoring” the judge’s decision and ensuring an adequate measure of proportionality for Eighth Amendment purposes.

Preparation  
for a  
Sentencing  
Hearing:  
*Developing  
a Coherent  
Theme of  
the Offense,  
Mitigation,  
etc.*

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Once the investigation is completed, counsel will need to develop the theories and mitigation themes.

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This will vary from case to case, but it is essential in creating a persuasive case for the minimum sentence.

Preparation for a  
Sentencing  
Hearing:  
*Motions and  
Memoranda*

In most cases, motions (e.g., a motion to bar life without parole for a defendant who was not the trigger-person, has intellectual disability, etc.) will need to be prepared and filed.

There will be other case-specific motions in many cases as well, e.g., motions in limine.

And, in each case, counsel should consider preparing and filing a sentencing memorandum that discusses each of the *Byars* factors and how they relate to the calibration of an appropriate sentence in their client's case.

Preparation for a  
Sentencing  
Hearing:  
*Negotiation with  
the Prosecution*

In most (all) cases, the best chance of an optimal result is to negotiate with the prosecution for an agreed upon sentence.

- Generally can only be done successfully after many of the above steps have been completed.

# Juvenile Sentencing Results Since *Aiken*

- Resentencing
  - 10 resentenced

Sentence	Defendants
LWOP	3 (2 white males, 1 black males)
40 years	2 (2 black males)
38 years	2 (1 white male, 1 black male)
35 years	1 (1 black male)
30 years	2 (1 Asian male, 1 white female)

- New cases
  - 3 complete (that we know of)
  - Two 30 year sentences (16 and 17 year olds)
  - 1 50 year sentence (15 year old, non-shooter)
  - All three black males

# Legal Challenges

## Categorical Bar

- Always preserve the claim that JLWOP is categorically prohibited by 8th Am. and S.C. Const. art. I, § 15.

## LWOP Bar for Sub-Classes

- Intellectual disability
- Insufficient participation in homicide

No LWOP without finding of “irreparable corruption” and/or “permanent incorrigibility” beyond a reasonable doubt.

## Functional Equivalent

- Present life expectancy data

30 Year Mandatory Minimum

## Other Motions

- Limiting victim impact testimony



## Other Potential JLWOP Legal/Factual Issues

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LWOP based on multiple juvenile offenses or a juvenile prior as a “strike.”

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LWOP for a first time offender is cruel and unusual punishment (i.e., insufficient proof of “irreparable corruption” v. “transient immaturity)).

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LWOP for group offenses is cruel and unusual punishment (i.e., insufficient proof of individual culpability).

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Extending the rules beyond age 18 in individual cases.

# Developments in the Science of Brain Development

# Recent Brain Development Research

- Research since *Roper* focuses on “emerging adulthood”
  - Neurobiological
  - Social
  - Psychological
- Research suggests similar characteristics in emerging adults as compared to juveniles:
  - Impulsivity
  - Tendency to engage in high-risk behavior
  - Deficits in self-regulation
  - Strong susceptibility to peer pressure
  - High degree of personality plasticity

Aude Henin & Noah Berman, *The Promise and Peril of Emerging Adulthood: Introduction to the Special Issue*, 23:3 COGNITIVE & BEHAVIORAL PRACTICE 263 (2016).

# Brain & White Matter Development

- Late teens & early 20s → rapid and substantial changes in the areas of the brain most closely connected with impulsivity and decision-making
- White matter relatively stable from 17-21, but increases dramatically from ages 21-25 (even more from 25-30)
  - White matter fibers transmit information between neurons, allowing different regions of the brain to communicate with each other.
  - Increased white matter volume, especially in the frontolimbic system enables individuals to:
    - Modulate anxiety
    - Deal with fear
    - Become social adept

Bradley Tabor-Thomas & Korlay Pérez-Edgar, *Emerging Adult Brain Development*, in THE OXFORD HANDBOOK OF EMERGING ADULthood 2 (Jeffrey Jensen Arnett, ed. 2015); Lars T. Westlye et al., *Life-Span Changes of the Human Brain White Matter: Diffusion Tensor Imaging (DTI) and Volumetry*, 20 CEREBRAL CORTEX 2055, 2062 (2010).



# Development of Brain Regions

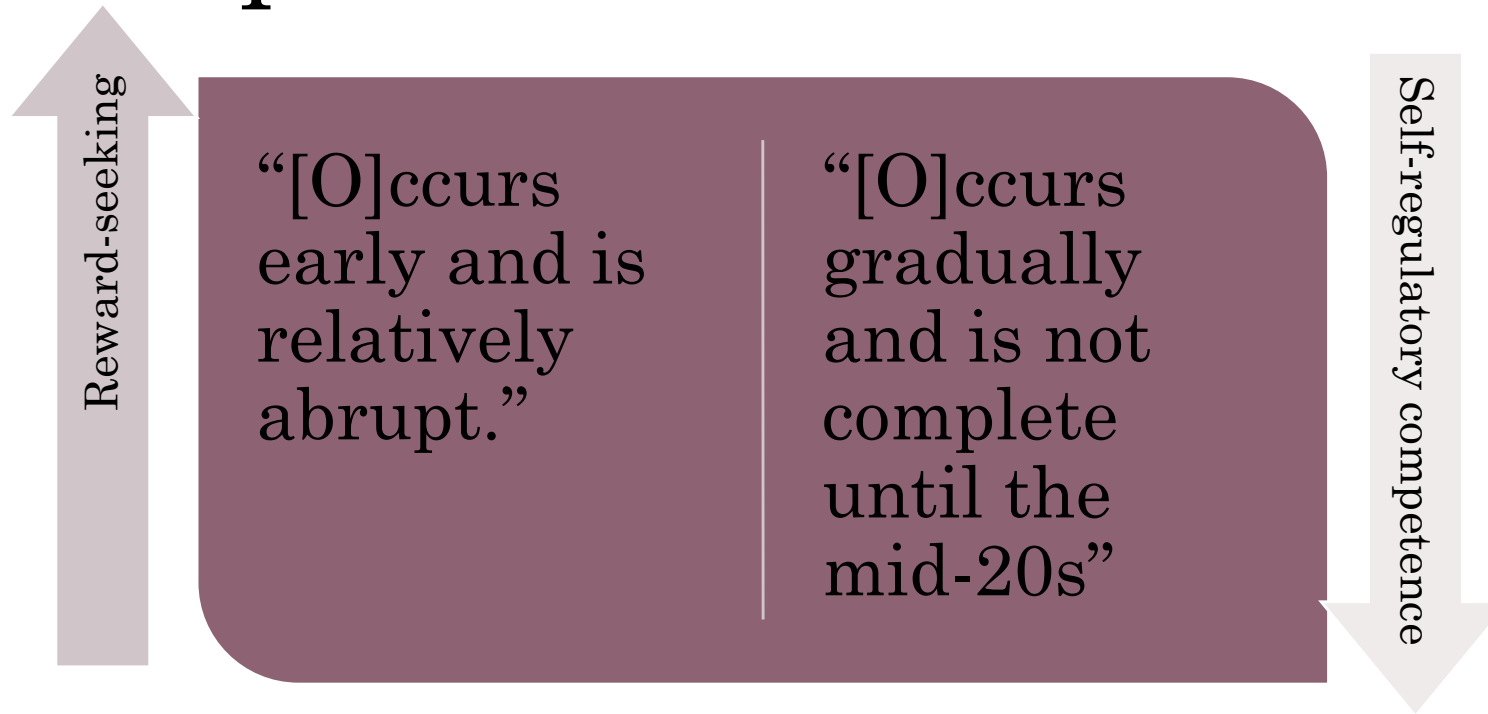
- Brains of people 18-21 remain immature in three areas that support self-control and emotional regulation:
  - Amygdala
  - Prefrontal cortex
  - Ventral striatum

B.J. Casey, *Beyond Simple Models of Self-Control to Circuit-Based Accounts of Adolescent Behavior*, 66 ANNUAL REV. OF PSYCHOLOGY 295, 300 (2015).

- fMRI studies – show the volume of cortical gray matter in areas critical to integrating higher thought processing does not peak until the mid-20s.
  - Results in lack of structural development necessary for higher level reasoning and emotional regulation.

Nitin Gogtay *et al.*, *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101:21 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE 8174 (2004).

# Developmental Mismatch



- *Result:* the period from the late teens to early 20s is “a time of heightened vulnerability to risky and reckless behavior.”

Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78, 83 (2008); Aude Henin & Noah Berman, *The Promise and Peril of Emerging Adulthood: Introduction to the Special Issue*, 23:3 COGNITIVE & BEHAVIORAL PRACTICE 263 (2016).

# Susceptibility to Negative Peer Pressure

- Risk-taking behavior is more frequent and more risky when a person 18-21 is around peers or older adults.
  - Company of peers correlated with increased activation of the reward-related regions of the brain (ventral striatum and orbitofrontal cortex)

Renata L.E.P. Reniers et al., *Is it all in the Reward? Peers Influence Risk-Taking Behaviour in Young Adulthood*, 108 BRIT. J. PSYCH. 276, 277 (2017).



# Representing Other Young Offenders



# The Problem

- Youthful offenders (ages 18-20 or 21) are treated more harshly than offenders 17 and under
- Decision-makers find “almost 18” aggravating



His birthday followed almost immediately on the heels of his offense. Within two weeks of the offense he would have been of voting age, of an age to serve in the armed forces, and of an age to lawfully take up arms in defense of his country and constitution. Instead Morgan took a job, sized up his victim and with an accomplice murdered a man who had hired him and given him gainful employment. **To refer to him and others of his age as a “child” for constitutional purposes when they commit premeditated murder as he did is constitutionally abhorrent to the rights of victims.**

- Prosecutor Argument, *South Carolina v. Morgan*

# Extending *Roper*, *Graham*, & *Miller*

- 18 years old is an arbitrary cutoff, set too low:
  - The *Roper* Court acknowledged that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Roper*, 543 U.S. at 574.
- *Commonwealth v. Brehold*, No. 14-CR-161, slip op. (Ky. Cir. Ct. Aug. 1, 2017) (Kentucky trial court granted a capital defendant’s motion to preclude the death penalty in his case, reasoning under *Roper* that the execution of an individual for an offense committed while under 21 violates the Eighth Amendment).

# Extending *Roper, Graham, & Miller*

- No significant distinctions with regard to juvenile and young adult brains

<i>Roper</i>	Scientific Research – Emerging Adults
“Lack of maturity and an underdeveloped sense of responsibility” that “often result in impetuous and ill-considered actions and decisions.”	Areas of the brain supporting self-control and emotional regulation remain immature.
“More vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”	Risk taking more frequent in emerging adults when peers or older adults are around
“Adolescents are overrepresented statistically in virtually every category of reckless behavior.”	Developmental mismatch → late teens & early 20s “a time of heightened vulnerability to risky and reckless behavior.”
Characters are “not as well formed” and personalities are “more transitory, less fixed” than adults	Brain continues to develop into 20s

# Justification for Line-Drawing at 21

- *Roper*: “The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.” *Id.*
- Same applies to the age of 21
  - Minimum age to consume, purchase, or possess alcohol
  - 41 states impose a minimum age of 21 to obtain a concealed carry permit for firearms
  - Federal law prohibits licensed gun dealers from selling handguns and ammunition to people under the age of 21
  - Federal immigration law permits parents of US citizens to petition for an immigrant visa for any “unmarried children under 21” and requires children to be 21 to petition for an immigrant visa for a parent
  - Age-of-candidacy requirements
    - US Constitution requires age of 25 to run for Congress
    - 27 states prohibit individuals from running for lower-house offices before the age of 21
  - DOJ report recommends that legislators should raise the age for criminal court to at least 21 because “young adult offenders ages 18-24 are, in some ways, more similar to juveniles than to adults.” U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, *Young Offenders: What Happens and What Should Happen*, Doc. No. NCJ 242653, at 2 (Feb. 2014).

# Types of Motions

- Motion to Bar LWOP for Youthful Offenders
- Motion to Bar Mandatory LWOP for Youthful Offenders
- Motion to Strike Mandatory Minimum for Youthful Offenders
- Others?

# Confronting “Almost 18 as Aggravating”

- Constitutionally required to treat youth as mitigating when the defendant is under 18
  - *Roper, Graham, and Miller* were class-based/categorical decisions
  - Science shows that “almost 18” is not nearing the end of juvenile brain development

# Educating Decision-Makers

- Motions can help educate judges even if they do not prevail
- Use experts:
  - Teach about brain development
  - Describe how a particular youthful offender's crime reflects the characteristics of youth



Questions?